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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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AUDREY G., et al.,

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Plaintiffs,

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v.

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CITY OF LAFAYETTE, et al.,

10

Defendants.

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Case No. [21-cv-03545-WHO](#)

12

**ORDER DENYING MOTION TO  
DISMISS THIRD AMENDED  
COMPLAINT**

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Re: Dkt. No. 39

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Defendants officer Kevin White, the City of Lafayette, and Contra Costa County (collectively, “the defendants”) again seek to dismiss the claims brought by plaintiffs Audrey G., Devin G., Jesse B., and James Larry Benton, Sr., (collectively, “the plaintiffs”). Defendants’ motion to dismiss the Third Amended Complaint (“TAC”) is DENIED. As I previously held, the plaintiffs have sufficiently pleaded a section 1983 claim arising under the Equal Protection Clause; it is not barred by qualified immunity because the alleged, extreme discriminatory conduct would be obviously unconstitutional. It is clearly established that police officers cannot treat people differently based on their race. Plaintiffs have also adequately alleged a due process-based section 1983 claim under the state-created danger doctrine. The state law claims (violations of the Ralph Act and Bane Act, along with negligence and intentional infliction of emotion distress) may also proceed as pleaded. The defendants’ argument that the minor plaintiffs’ state law claims against the County and White are barred by the California Government Claims Act is not persuasive; the plaintiffs did not file this suit until after their claims were rejected.

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**BACKGROUND**

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This case stems from a May 6, 2020, incident that began in Lafayette, California, and continued into Alameda County via Highway 24. TAC [Dkt. No. 38] ¶ 9. The plaintiffs, who are

1 African American, stopped at a Lafayette store to pick up bait for a fishing trip. *Id.* ¶¶ 3, 10.  
2 When they entered the store, a salesperson—described as an “older white lady”—began to follow  
3 them. *Id.* ¶ 11. The plaintiffs state that while they were inside the store, “employees misidentified  
4 them as four Black male armed robbers and called the Lafayette police.” *Id.*

5 As the plaintiffs left the store, Benton “heard and observed” the salesperson on the phone  
6 “describing him and the minor children, his car, the license plate and the direction that he was  
7 headed.” *Id.* ¶ 12. Benton drove out of the parking lot and two Lafayette police cars began to  
8 follow him. *Id.*

9 Benton then entered Highway 24, where one police car, allegedly driven by officer White,  
10 “swerved in front and back of Mr. Benton’s car, pulled too close to his rear bumper, flashed a  
11 blinding spotlight into the car and persisted in a series of dangerous maneuvers” as Benton drove  
12 65 miles per hour. *Id.* ¶¶ 13, 16. The second police car, allegedly driven by officer Neil Black,  
13 “continued to drive closely behind” Benton. *Id.* At one point, the police cars “boxed in” Benton’s  
14 car between them. *Id.*

15 Benton was “forced to slow down multiple times, change lanes and did not believe that he  
16 was free to drive away from the two police cars who appeared to be pursuing him for some  
17 unknown reason.” *Id.* ¶ 18. At one point, he “put his hands up at the window and waved to”  
18 White in an attempt to get his attention. *Id.* ¶ 17. Benton mouthed, “Do you want me to pull  
19 over?” *Id.* White laughed in response. *Id.* White also shined a police spotlight into Benton’s  
20 vehicle multiple times, blinding Benton and causing him to fear that he would “lose control of the  
21 car and injure the children in his care.” *Id.* ¶¶ 17-18. But, the plaintiffs allege, the police officers  
22 never activated their cars’ lights or sirens, nor otherwise direct Benton to pull over. *Id.* ¶ 14.

23 The TAC alleges that police unlawfully pursued, harassed, and intimidated the plaintiffs  
24 based on “inaccurate racial profiling” by store employees. *See id.* ¶ 13. It further contends that  
25 the officers “could clearly see that plaintiffs did not fit the description of, and were not four Black  
26 males as asserted,” yet “persisted in their harassment of plaintiffs.” *Id.* ¶ 19.

27 On or about November 3, 2020, the plaintiffs presented a government tort claim detailing  
28 their allegations to the Lafayette Police Department (“LPD”) as required by the California

1 Government Claims Act. *See id.* ¶ 21. The LPD rejected their claims about 10 days later. *See id.*  
2 ¶ 22. On or about March 23, 2021, the plaintiffs presented a claim to Contra Costa County. *Id.* ¶  
3 23. That claim was rejected as untimely on or about April 2. *Id.* ¶ 24. The plaintiffs filed an  
4 application to file a late claim, which was granted for the minor plaintiffs only. *Id.* The County  
5 then denied the minor plaintiffs' claims on July 13. *Id.*

6 The plaintiffs filed this suit on May 11, 2021, alleging civil rights violations and other  
7 claims against White, the City of Lafayette, and 10 unnamed Doe defendants. Dkt. No. 1.  
8 Although Contra Costa County was not a named defendant, the initial complaint stated that the  
9 County had rejected the plaintiffs' government tort claims as untimely, that plaintiffs had  
10 submitted an application to file a late claim, and that plaintiffs would "amend this complaint to  
11 include their claims against Contra Costa County at the appropriate time following the disposition  
12 of the government tort claim." *See id.* ¶ 20.

13 The plaintiffs filed an amended complaint on August 19, 2021. Dkt. No. 8. I dismissed all  
14 but their intentional infliction of emotional distress ("IIED") and negligence claims as  
15 insufficiently pleaded, and granted leave to amend. *See Mot. to Dismiss Order ("First MTD*  
16 *Order") [Dkt. No. 24] 1. The plaintiffs filed their Second Amended Complaint ("SAC") soon  
17 after, which defendants again moved to dismiss. *See Dkt. Nos. 25, 30.* I dismissed two claims:  
18 one for negligent retention, supervision, and training, and one for a section 1983 violation arising  
19 under the Fourth Amendment, with leave to amend the latter. *See Mot. to Dismiss Order ("Second*  
20 *MTD Order") [Dkt. No. 37] 1. The plaintiffs filed their TAC on March 29, 2022, and the  
21 defendants moved to dismiss. Dkt. Nos. 38, 39.<sup>1</sup>**

## 22 **LEGAL STANDARD**

23 Under Federal Rule of Civil Procedure 12(b)(6), a court must dismiss a complaint if it fails  
24 to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion, the plaintiff  
25 must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v.*  
26 *Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff pleads facts  
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28 <sup>1</sup> Pursuant to Civil Local Rule 7-1(b), this motion is suitable for disposition without oral argument.

1 that “allows the court to draw the reasonable inference that the defendant is liable for the  
2 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). There must  
3 be “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* While courts do not  
4 require “heightened fact pleading of specifics,” a plaintiff must allege facts sufficient to “raise a  
5 right to relief above the speculative level.” *See Twombly*, 550 U.S. at 555, 570. In deciding  
6 whether the plaintiff has stated a claim upon which relief can be granted, the court accepts the  
7 plaintiff’s allegations as true and draws all reasonable inferences in her favor. *See Usher v. City of*  
8 *Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as  
9 true “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable  
10 inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

## 11 DISCUSSION

12 The factual allegations in the TAC substantially mirror those in the previous amended  
13 complaint. *Compare TAC with Dkt. No. 25.* The claims that survived the previous motion to  
14 dismiss do so again for the reasons articulated in the Second MDT Order. The plaintiffs have  
15 adequately alleged claims against White under section 1983 arising under the Fourteenth  
16 Amendment’s Equal Protection Clause and the under the Ralph and Bane Acts, and against all  
17 defendants for IIED and negligence. I now address the new arguments.

### 18 I. OFFICER BLACK

19 The TAC names a new defendant, officer Neil Black. *See TAC at 1.* As of the issuance of  
20 this Order, Black has not entered an appearance in this case. Although a summons was issued on  
21 May 20, there is no indication from the docket that he has been served. *See Dkt. No. 46.* Nothing  
22 in this Order precludes Black from filing his own motion to dismiss, specific to the claims against  
23 him, once he is served and enters an appearance.

### 24 II. THE CALIFORNIA GOVERNMENT CLAIMS ACT

25 Next, the defendants argue for the first time that the minor plaintiffs’ claims against Contra  
26 Costa County and officer White are barred by their failure to comply with the California  
27 Government Claims Act. *See Mot. to Dismiss (“MTD”) [Dkt. No. 39] 5:4-5.* This argument is  
28 not persuasive.

1        The Government Claims Act “establishes certain conditions precedent to the filing of a  
2 lawsuit against a public entity.” *California v. Superior Court*, 32 Cal. 4th 1234, 1237 (2004).  
3 “[C]laims against public employees or former public employees for injuries resulting from acts or  
4 omissions in the course of their employment must be presented if a claim against the employing  
5 entity for the same injury must be presented.” *People ex. rel. Harris v. Rizzo*, 214 Cal. App. 4th  
6 921, 939 (2013).

7        Section 911.2(a) requires the presentation of a claim for injury to a person or property to a  
8 public entity no later than six months after the cause of action accrues. Cal. Gov’t Code §  
9 911.2(a). Section 945.4 states that

10        no suit for money or damages may be brought against a public entity on a cause of  
11 action for which a claim is required to be presented . . . until a written claim  
12 therefor has been presented to the public entity and has been acted upon by the  
board, or has been deemed to have been rejected by the board.

13        *Id.* § 945.4. The California Supreme Court has held that “under these statutes, failure to timely  
14 present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit  
15 against that entity.” *California*, 32 Cal. 4th at 1239.

16        The plaintiffs presented their claims to Contra Costa County on March 23, 2021.<sup>2</sup> TAC ¶  
17 23. The County rejected them for alleged untimeliness on April 2. *Id.* ¶ 24. So far, so good.

18        The plaintiffs then submitted applications to file a late claim, as permitted under the law.  
19 *See id.* ¶ 24; *see also* Cal. Gov’t Code § 911.4 (“When a claim that is required by section 911.2 to  
20 be presented not later than six months after the accrual of the cause of action is not presented  
21 within that time, a written application may be made to the public entity for leave to present that  
22 claim.”). While that application was pending, the plaintiffs filed this suit on May 11, 2021. *See*  
23 Dkt. No. 1 ¶ 20 (“Plaintiffs have submitted a second application to file late claim . . . and will  
24 amend this complaint to include their claims against Contra Costa County at the appropriate time  
25 following the disposition of the government tort claim.”). The minor plaintiffs were granted leave

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27        <sup>2</sup> The plaintiffs also presented claims to the City of Lafayette. TAC ¶ 21. They were rejected on  
28 November 13, 2020—well before this lawsuit was filed. *See id.* ¶ 22. The defendants do not  
challenge the plaintiffs’ compliance with the Government Claims Act regarding their claims  
against the City. *See generally* MTD.

1 to submit a late claim, which the County denied on July 13, 2021. TAC ¶ 24.

2 The defendants argue that because the plaintiffs filed this suit while their application to file  
3 a late claim was pending, they had not exhausted their claims and their causes of action did not  
4 accrue. *See* MTD at 5:17-6:2. They rely heavily on a recent case where the California Court of  
5 Appeal held that a plaintiff's complaint—filed on the same day as his application to file a late  
6 claim—was premature because he did not wait for the public entity to take action on the  
7 application, nor did he wait for the statutory time period to expire for it to do so. *See id.* at 6:3-25  
8 (citing *Lowry v. Port San Luis Harbor Dist.*, 56 Cal. App. 5th 211, 219 (2020)). The court  
9 concluded that the plaintiff “failed to comply with the [Government Claims] Act because he filed  
10 a complaint before his claim was rejected.” *Lowry*, 56 Cal. App. 5th at 219. It further held that  
11 the plaintiff’s noncompliance could not “be cured by amending the complaint to allege he  
12 complied,” as the lawsuit was “precluded because it was not preceded by a rejection of a claim.”  
13 *Id.* at 221.

14 There is a critical distinction between *Lowry* and the case at hand. In *Lowry*, the plaintiff’s  
15 application for permission to present a late claim was the first time he presented the tort claim to  
16 the public entity. *See id.* at 216 (“A proposed claim was attached to the application.”). It was  
17 rejected 19 days after the lawsuit was filed. *See id.* at 215-16. However, the plaintiffs in this case  
18 presented a claim *before* applying to present a late claim. TAC ¶ 24. The initial claim was  
19 rejected on April 2, 2021—more than five weeks before this lawsuit was filed. *See id.*

20 This distinction makes a difference. *Lowry* does not speak to whether a plaintiff’s lawsuit  
21 is precluded if it was filed *after* a claim was initially rejected but while an application to file a late  
22 claim was still pending. Courts interpreting the Government Claims Act treat requests for  
23 permission to file a late claim differently than the claims themselves. Indeed, the California Court  
24 of Appeal recently articulated the distinction in *Coble v. Ventura Cty. Health Care Agency*, 73  
25 Cal. App. 5th 417, 421 (2021), where it was asked to determine whether a pandemic-related filing  
26 extension applied only to the six-month statutory period for presenting a timely claim, or whether  
27 it also applied to the one-year period for filing an application for leave to present a late claim. In  
28 holding that it only applied to the six-month time period for claim presentation, the court wrote:

1 The statutory scheme here clearly distinguishes between a “claim” and an  
2 “application.” The terms are not synonymous. “Claim,” is a word of art. Section  
3 910 sets forth the information that must be included in a claim. . . . Section 911.4,  
4 subdivision (a) provides, “When a *claim* that is required by Section 911.2 to be  
5 presented not later than six months after the accrual of the cause of action is not  
6 presented within that time, a *written application* may be made to the public entity  
7 for leave to present that *claim*.” “The *application* . . . shall state the reason for the  
8 delay in presenting the *claim*. The proposed *claim* shall be attached to the  
9 application.” Section 912.2 provides, “If an *application* for leave to present a [late]  
10 *claim* is granted by the board pursuant to Section 911.6, the *claim* shall be deemed  
11 to have been presented to the board upon the day that leave to present the [late]  
12 *claim* is granted.”

13 *Coble*, 73 Cal. App. 5th at 426 (citations omitted) (emphasis in original). As another court wrote:  
14 “Filing a request for permission to file a late claim does not constitute the actual filing of a claim.”  
15 *Hill v. City of Clovis*, No. 11-CV-1391, 2012 WL 787609, at \*11 (E.D. Cal. Mar. 9, 2012).

16 Moreover, I agree with Chief Magistrate Judge Joseph Spero’s rationale in *Robinson v.*  
17 *Alameda County*, 875 F. Supp. 2d 1029, 1044 (N.D. Cal. June 21, 2021), that amendment could—  
18 and in fact did—cure any defect. In *Robinson*, Judge Spero wrote:

19 While compliance with the claims statute is mandatory and failure to file a claim is  
20 fatal to the cause of action, it does not necessarily result in dismissal. Rather, a  
21 plaintiff who fails to comply with the CGCA is merely *subject* to a motion to  
22 dismiss. The court has discretion to dismiss with leave to amend to obtain  
23 compliance with the CGCA, unless it could not possibly be cured by the allegation  
24 of other facts.

25 875 F. Supp. 2d at 1044 (citing in part *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000)). The  
26 issue in *Robinson* was different; there, the plaintiff’s complaint did not mention the Government  
27 Claims Act whatsoever, let alone plead compliance or a reason for noncompliance. *Id.* at 1044.  
28 Judge Spero also ultimately determined that the plaintiff’s claim could not be cured by the  
allegation of other facts. *Id.* at 1046. But the takeaway is this: If the plaintiff could plead other  
facts showing compliance with the Government Claims Act (or a reason excusing compliance), the  
court may grant her leave to amend to do so. *See also White v. Sacramento Police Dep’t*, No. 21-  
CV-02211, 2022 WL 2052596, at \*2 (E.D. Cal. June 7, 2022) (dismissing state law claims for  
failure to allege compliance with the Government Claims Act but granting leave to amend because  
it was “not clear” that the plaintiff “could not possibly cure this defect”).

1       When the plaintiffs filed their SAC on August 19, 2021, they cured any defect by alleging  
2 a new fact: that the County denied the minor plaintiffs' late-filed claim on July 13, 2021. *See* Dkt.  
3 No. 8 ¶ 22. The TAC alleges the same. *See* TAC ¶ 24. Based on my reading of the Government  
4 Claims Act, the plaintiffs have sufficiently pleaded compliance. They presented their claims to the  
5 County on March 23, 2021. *Id.* ¶ 23. The County rejected those claims on April 2, 2021. *Id.* ¶  
6 24. They filed suit on May 11, 2021. Dkt. No. 1. Given the statutory requirements, the  
7 distinction between a claim and an application to file a late claim, and the lack of authority  
8 suggesting otherwise, the minor plaintiffs' state law claims may proceed.

9       **III. THE EQUAL PROTECTION CLAIM**

10       The next issue is whether the plaintiffs' Equal Protection claim, which provides a basis for  
11 their section 1983 claim, is barred by qualified immunity. Police officers are not shielded by  
12 qualified immunity if "(1) the facts taken in the light most favorable to the party asserting the  
13 injury show that the officers' conduct violated a constitutional right and (2) the right was clearly  
14 established at the time of the alleged violation." *Thompson v. Rahr*, 885 F.3d 582, 586 (9th Cir.  
15 2018) (citation and modifications omitted).

16       A claim brought under the Fourteenth Amendment's Equal Protection Clause must assert  
17 that the plaintiff was intentionally treated differently than other similarly situated individuals.  
18 *Recinto v. U.S. Dep't of Veterans Affs.*, 706 F.3d 1171, 1177 (9th Cir. 2013). The plaintiff must  
19 show that "the defendants acted with an intent or purpose to discriminate against the plaintiff  
20 based upon membership in a protected class." *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th  
21 Cir. 1998). Purposeful discrimination arises when the decisionmaker acts "because of, not merely  
22 in spite of, the action's adverse effects upon an identifiable group." *See Iqbal*, 556 U.S. at 676-77  
23 (citation and modifications omitted).

24       I previously held that the plaintiffs had sufficiently stated a section 1983 claim arising  
25 under the Equal Protection Clause. *See* Second MTD Order at 10:21-11:2. The same is true of the  
26 TAC. The plaintiffs allege not only that the officers drove at dangerously high speeds to harass  
27 plaintiffs but that the officers could "clearly see" that they did not fit the description provided by  
28 the store. TAC ¶ 19. Given the other allegations—namely, that White repeatedly shined a light

1 into the vehicle bright enough to blind Benton—this is a reasonable inference. *See id.* ¶¶ 16-18.  
2 Yet, according to the TAC, the officers “persisted in their harassment of plaintiffs” and did so  
3 “based solely upon their race.” *Id.* ¶ 19. This is enough for the claim to proceed.

4 Because the plaintiffs adequately alleged that officer White violated their Fourteenth  
5 Amendment right to equal protection under the law, the first step is satisfied. The question is  
6 whether that right was “clearly established” at the time it was violated.

7 The Supreme Court has “repeatedly told courts—and the Ninth Circuit in particular—not  
8 to define clearly established law at a high level of generality.” *Ashcroft v. al-Kidd*, 563 U.S. 731,  
9 742 (2011). Although a case directly on point is not required, “existing precedent must have  
10 placed the statutory or constitutional question beyond debate.” *Kisela v. Hughes*, 138 S. Ct. 1148,  
11 1152 (2018). The dispositive question is “whether it would be clear to a reasonable officer that his  
12 conduct was unlawful in the situation he confronted.” *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

13 The plaintiffs do not, as the defendants contend, need to identify case law holding that  
14 police violate the Equal Protection Clause “when, in response to the call describing a suspect  
15 vehicle, they drive in close proximity to that vehicle or illuminate it using a spotlight” or when a  
16 person “asks if he should pull over and the officer only laughs in response.” MTD at 10:7-11.  
17 The Ninth Circuit has held that “because the non-discrimination principle is so clear,” it is  
18 “especially true in equal protection cases” that a prior case with materially similar facts is not  
19 needed to show that the right to be free from discrimination is clearly established. *Elliot-Park v.*  
20 *Manglona*, 592 F.3d 1003, 1008-09 (9th Cir. 2010). *Elliot-Park* focused on “non-discriminatory  
21 administration of protective services” by police, holding that because it was “long established that  
22 state employees can’t treat individuals differently on the basis of their race,” officers had “a more  
23 than fair warning” that their failure to investigate and arrest a suspected drunk driver because of  
24 race violated the Equal Protection Clause. *See id.* at 1008-09. The court also discussed equal  
25 protection violations by police more broadly, writing that “[i]t hardly passes the straight-face test  
26 to argue at this point in our history that police could reasonably believe they could treat  
27 individuals disparately based on their race.” *See id.* at 1008.

28 The plaintiffs allege that officer White treated them differently because of their race, as

1 indicated by his swerving around Benton's vehicle, pulling close to its bumper, and boxing Benton  
2 in at high speeds after determining that he and the minor plaintiffs did not match the description  
3 provided by the store. *See TAC ¶¶ 15-19.* As in *Elliot-Park*, they do not need a case with  
4 materially similar facts to show that it was clearly established that White could not discriminate  
5 against them on the basis of race. Police officers have long been on notice that they cannot do so.  
6 Taking the allegations in the TAC as true, qualified immunity does not bar the plaintiffs' section  
7 1983 claim based on the Equal Protection Clause.

8 **IV. THE SUBSTANTIVE DUE PROCESS CLAIM**

9 The plaintiffs now assert a section 1983 claim against officers White and Black arising  
10 under the Due Process Clause. *See id.* ¶¶ 31-33 (alleging that the officers violated the plaintiffs'  
11 "Fourteenth Amendment rights to due process and equal protection of the laws"). The defendants  
12 argue that this claim is improper, as the plaintiffs did not invoke due process in the SAC and my  
13 Order on that motion to dismiss "did not state that plaintiffs were authorized to raise new claims."  
14 MTD at 10:17-20.

15 The rules regarding amendment are generous. Federal Rule of Civil Procedure 15(a)(2)  
16 directs courts to "freely give leave [to amend] when justice so requires." The Ninth Circuit  
17 construes this rule broadly, stating that it should be applied "with extreme liberality." *See, e.g.*,  
18 *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). Although the  
19 plaintiffs did not seek leave to amend to add a due process-based section 1983 claim, I would have  
20 granted such a request. Dismissing such a claim now would elevate form over substance, wasting  
21 time and resources litigating motions for leave to amend and then to dismiss.

22 The real question is whether the plaintiffs have sufficiently stated a substantive due process  
23 claim. The threshold step in asserting a substantive due process violation is to show that the  
24 plaintiff was "deprived of a 'constitutionally protected life, liberty or property interest.'" *Hotop v.*  
25 *City of San Jose*, 982 F.3d 710, 718 (9th Cir. 2020) (citing cases). The Supreme Court has stated  
26 that "[w]here a particular Amendment 'provides an explicit textual source of constitutional  
27 protection' against a particular sort of government behavior, 'that Amendment, not the more  
28 generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'"

1        *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (Rehnquist, C.J., plurality) (citing *Graham v.*  
2        *Connor*, 490 U.S. 386, 395 (1989)).

3            To the extent that the plaintiffs base their claim on a seizure by police (which I held was  
4        properly pleaded in the SAC, but felled by qualified immunity), it is covered by the Fourth  
5        Amendment. *See* Second MTD Order at 7:17-28, 9:8-16; *County of Sacramento v. Lewis*, 523  
6        U.S. 833, 843 (1998) (holding that substantive due process analysis was appropriate because no  
7        seizure occurred and thus, the claim was not “covered by” the Fourth Amendment). The same  
8        would be true if the plaintiffs alleged a due process violation based on an excessive use of force.  
9        *See Godoy v. Cty. of Sonoma*, No. 15-CV-00883-WHO, 2016 WL 269867, at \*4 n.4 (N.D. Cal.  
10      Jan. 22, 2016) (“To the extent plaintiffs’ alleged Fourteenth Amendment violations are based on  
11      the officers’ use of excessive force, they must be analyzed under the Fourth Amendment  
12      standard.”).

13            However, “[i]t is well established that the Constitution protects a citizen’s liberty interest  
14      in her own bodily security.” *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006).  
15            The Ninth Circuit recognizes substantive due process claims arising from a “state-created  
16      danger”—“that is, where state action creates or exposes an individual to a danger which he or she  
17      would not have otherwise faced.” *See id.* (citations omitted). To prove such a danger, a plaintiff  
18      must establish three elements:

19            First, she must show that the officers’ affirmative actions created or exposed to her  
20      an actual, particularized danger that she would not otherwise have faced. Second, she must show  
21      that the injury she suffered was foreseeable. Third, she must show that the officers were deliberately indifferent to the known danger.

22        *Martinez v. City of Clovis*, 943 F.3d 1260, 1271 (9th Cir. 2019).

23            All three elements are found within the TAC. It describes a series of affirmative acts by  
24      the officers—including swerving in front and back of Benton’s car, pulling too close to its rear  
25      bumper, boxing it in, and flashing a bright light inside, all at a speed of 65 miles per hour—that  
26      created an actual, particularized danger that the plaintiffs otherwise would not have faced. *See*,  
27      e.g., TAC ¶¶ 16-18. The injuries alleged—including “severe mental anguish and emotional  
28      distress, anxiety, [and] worry”—were a foreseeable result of that conduct, particularly when, as

1 alleged, police had no reason to continue these actions. *See id.* ¶¶ 14 (alleging that police never  
2 activated their cars' lights or sirens, or directed Benton to pull over), 28-29 (describing injuries).  
3 Finally, the TAC expressly alleges that the officers acted with deliberate indifference to the known  
4 danger. *See, e.g., id.* ¶¶ 6-7, 33. This is also supported by specific facts alleged—for example,  
5 that White laughed at Benton when Benton asked if he should pull over. *See id.* ¶ 17. The  
6 plaintiffs have sufficiently stated a substantive due process under the state-created danger doctrine.

7 Qualified immunity does not bar the claim at this point. For more than three decades, state  
8 actors within the Ninth Circuit have been on notice that they may violate the Due Process Clause  
9 by affirmatively placing a person in danger that she otherwise would not have faced. *See, e.g.,*  
10 *Wood v. Ostrander*, 879 F.2d 583, 589-90 (9th Cir. 1989); *Kennedy*, 439 F.3d at 1067.  
11 Specifically, police officers have been aware that this doctrine applies to their actions—*Wood* and  
12 *Kennedy* are but two examples of cases where courts have recognized a state-created danger in the  
13 context of policing. A case with identical facts is not required, as the preexisting law gave the  
14 officers fair warning that their conduct was unlawful. *See Kennedy*, 439 F.3d at 1065-66 (holding  
15 that a police officer was not entitled to qualified immunity, even without an identical case, because  
16 it was “beyond dispute” that at the time of the alleged actions, “it was clearly established that state  
17 officials could be held liable where they affirmatively and with deliberate indifference placed an  
18 individual in danger she would not otherwise have faced”).

19 To the extent that the plaintiffs assert a section 1983 claim based on the Due Process  
20 Clause, it may proceed.

21 **V. NEW CLAIMS**

22 Next, the TAC appears to assert new claims against new defendants. The SAC alleged  
23 claims under the Ralph and Bane Acts by “plaintiffs against defendant White,” and the IIED and  
24 negligence claims by “plaintiffs against all defendants.” *See SAC* [Dkt. No. 25] 8-11. The TAC,  
25 however, asserts these four claims by “minor plaintiffs against all defendants.” *See TAC* at 8-11.  
26 It then asserts a Ralph Act claim by Benton against White, Black, and the City of Lafayette; and  
27 Bane Act, IIED, and negligence claims by Benton against the City. *See id.* at 12-13.

28 The plaintiffs’ Ralph and Bane Act claims may proceed only against White, as alleged in

1 the TAC; the plaintiffs cannot bring in the municipal entity defendants at this stage. Benton may  
2 assert claims only against White and the City; I previously determined that his claims against  
3 Contra Costa County were barred by the statute of limitations. *See* First MTD Order at 9:23-  
4 10:11. The TAC does not appear to assert new claims by Benton against White and the City, as  
5 feared by defendants. Instead, it inartfully attempts to reflect my prior decision. If good cause is  
6 discovered in the future to assert new claims, the plaintiffs may seek leave to amend.

7 **VI. THE CITY AS A DEFENDANT**

8 Finally, the defendants again seek the dismissal of the City of Lafayette, arguing that the  
9 plaintiffs pleaded no facts showing that the officers were employed by the City; defendants assert  
10 that they worked for Contra Costa County. MTD at 4:6-19. That may well be true, but the  
11 plaintiffs do not have to accept the City's word for it. For now, the TAC plausibly pleads the  
12 existence of an employment relationship between the officers and the City. It alleges that White  
13 "is a peace officer employed by either LPD and/or Contra Costa County." TAC ¶ 6. It asserts the  
14 same about officer Black. *Id.* ¶ 7. It further alleges that the City of Lafayette "stands in a  
15 contractual relationship with Contra Costa County for police services." *Id.* ¶ 8. Once the precise  
16 nature of the relationship between the defendants is clear, I expect to see either voluntary dismissal  
17 of the City or a motion for summary judgment by the City. *See* Second MTD Order at 15:27-16:1.

18 **CONCLUSION**

19 The defendants' motion to dismiss is DENIED.

20 **IT IS SO ORDERED.**

21 Dated: July 7, 2022

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William H. Orrick  
United States District Judge